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No. 359.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

RUBY NAFIE,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF.

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ARGUMENT

1. The Government has ignored in its Brief in Opposition our second contention that the hearsay declaration of co-defendant Rizzo, as related by the witnesses Moore, Betscher and McGill, should not have been admitted against petitioner because there was no evidence *aliunde* that at the time Rizzo made them petitioner was associated in a conspiracy with Rizzo (Pet. 16-19). Indeed,

there was no evidence of the existence of a conspiracy at all when Rizzo made the declarations to Moore and Betscher in May and September 1960, as each of them rejected the scheme. This contention, though clearly made in the Court below, was likewise ignored there both by the Government and the Court. So that the Court may assure itself, if it desires, that we made the contention there, we are filing with the Court a copy of our brief below (See Argument II, pp 46-49), a copy of our reply brief below (See p. 3) and a copy of our petition for a rehearing below (See point 3, pp. 2-3). We believe, as did the Sixth Circuit in **Nibbelink v. United States**, 66 F. 2d 179, and the District of Columbia Circuit in **Taylor v. United States**, 260 F. 2d 737, that this is an important point of law, upon which we should somewhere get a hearing and decision. If declarations of a co-conspirator are admitted on the theory of agency (**Lutwak v. United States**, 344 U. S. 604, 617), then **Taylor** and **Nibbelink** are correct in their holdings that declarations made before the beginning of the conspiracy (as far as the proof shows) are inadmissible against a co-conspirator.

2. As the Government has chosen in its Brief to rearrange the order of our contentions, we shall assent to its wishes, and reply in the order which it has chosen.

The Government says that our fears that prejudicial newspaper publicity would be spread to the entire panel by questioning before the panel each of the 18 individual jurors who had read articles concerning what he had read (Pet. 25-27) proved groundless, as no prejudicial information was disclosed (Br. Op. 9). This was because counsel did not ask the jurors, and could not ask them, what they had read. Had we done so, of course, the prejudicial information would have been disclosed to all. Rizzo's conviction was but a small part of the prejudicial information contained in the articles, as Nafie's Motion Ex. 1

shows. The reference to his conviction was by counsel for Rizzo in objecting to such examination in the presence of the entire panel. The prejudice in the situation occurred because we were unable to find out, and did not find out, what prejudicial knowledge was possessed by each member of the panel.

3. In arguing the sufficiency of the evidence (Br. Op. 10-11), the Government makes conclusionary statements which we do not believe the record justifies (See Pet. 15-16 and Statement, Pet. 4-14). There was no "close business and personal relationship" between petitioner and Rizzo. In truth, officer Carnaghi lent the money to Rizzo. We believe that if petitioner's alleged statement, in refusing to cash a forged check, that it would be easier to rob the bank, is taken seriously, it does not implicate her in a conspiracy to rob the bank. Rather, it is an exculpatory statement. The evidence as to whether her report of the robbery was false is, to say the most, inconclusive. Further, the jury so indicated by the question it asked the Court. There was no evidence that petitioner believed that the stolen money coud not be identified, only that she did not believe Rizzo had it. The fact that the Bank did not record serial numbers of new bills is immaterial. The money was traceable, and traced, because of petitioner's own action (not that of the Bank) in breaking the package of new $20 bills apart and retaining almost half of them in her **own** cage, a fact she certainly would have known if she were in on a phoney bank robbery. When a bit of testimony like this is reared on appeal in an effort to sustain a conviction, pulled out of its context of truth, the Government is indeed grasping for straws. Certainly, no unbiased reader of this record can fail to be impressed, as was the jury, with some doubt as to the guilt of this young lady. And the record is replete with prejudicial errors.

4. The instruction as to guilty conscience being inferred from a false report must indeed be read in context with the instruction on the Government's position. As we have pointed out in our petition (Pet. 22-23), when so read it in effect charged the jury that petitioner could be convicted solely on a false report.

5. As to the trial Court's prohibiting the defense from cross-examining the Government's principal witness as to what he told the F. B. I. on the day of the robbery, before learning of Rizzo's declarations implicating petitioner (Pet. 19-22), the Court below held that all the trial Court did was to suggest a proper manner for such cross-examination. This, of course, would not do, because there was no F. B. I. report of the interview and a contradictory statement could not be first shown. So now for the first time the Government says that what the trial Court did was to restrict "repetitious questioning" (Br. Op. 13). The record (Tr. 515-517) does not sustain either justification, and this clear error was highly prejudicial.

6. It is, of course, true that the defense attempted to keep all evidence concerning the Franklin Life Insurance checks out of the case (See Pet. 23-25). But the Government injected the matter into the case over defense objections. This was not the result of "incidental references" (Br. Op. 13). For certainly the statement by Betscher was pure hearsay, not in furtherance of the alleged conspiracy, for he had never met petitioner (T. 228). It was injected into the case purposefully over extended objections (Tr. 223-225). Furthermore, both he and the Government knew it was false, for only one check had been cashed at the Mercantile Trust Company (T. 138, Nafie's Motion Ex. 1). It is ridiculous to say that petitioner attempted to place herself in an untenable position. We met the Government's evidence (admitted over

our objection) with all the evidence within our control. Mrs. Nafie's testimony that she had never cashed a check for Rizzo. Moreover, the Government opened the subject in argument by saying Moore "heard Ruby Nafie state that she would not handle any more checks" (T. 853). For the first time here, the Government now says that defense counsel acquiesced in the Court's prejudicial ruling and statement to the jury. This is indeed taking things out of context at this late date. Because the case was so thin evidencewise, and the check matter so prejudicial, we attempted to avoid as much prejudice as possible at this crucial point. But despite all our efforts, the Court in effect erroneously instructed the jury that petitioner had cashed fraudulent checks for Rizzo. In **United States v. Vintuto**, 182 F. 2d 519, 523, the Third Circuit held it to be error not to permit defense counsel to argue an inference in a very similar situation.

7. When the jury made its inquiry, we asked the Court to reread the instructions on conspiracy favorable to petitioner, and the Court clearly ruled that it would not do so (T. 941). We are not complaining about the instruction given, but about the Court's refusal to give instructions favorable to petitioner at this crucial time.

For the reasons stated in the petition and herein, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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